

CIVIL CASE NO. 3:08cv441

Defendant.

ORDER

On October 6, 2008, the Defendant State Farm Fire and Casualty Company (State Farm) filed a motion to dismiss which was contained within its Answer to the Complaint. [Doc. 4]. The motion was filed presumably to preserve State Farm's ability to seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). In response to an inquiry from the Clerk of Court, State Farm then separately filed an Answer. [Doc. 6]. The Plaintiff filed response to the motion to dismiss. [Doc. 8]. The motion

remains pending.

On June 15, 2009, State Farm filed a second motion to dismiss, [Doc. 15], which is identical to the first motion. A member of chambers staff communicated with counsel for both parties in an attempt to clarify the filing of two motions to dismiss and was advised that the second one was filed out of an abundance of caution because the first one was contained within an Answer. Local Rule of Civil Procedure 7.1(C)(1) (“Motions to dismiss contained in answers to complaints ... are considered by the Court to be preserved. A party wishing to have decided any preserved motion shall file a separate motion and supporting brief.”). Both counsel agreed that the second motion is duplicative of the first and that the first motion may be terminated as a pending motion, provided that the Plaintiff’s response remain applicable to the second.

On July 6, 2009, State Farm moved for summary judgment. [Doc. 18]. Contained within that motion are arguments identical to those contained within the motion to dismiss. The Plaintiff has responded to the motion for summary judgment.

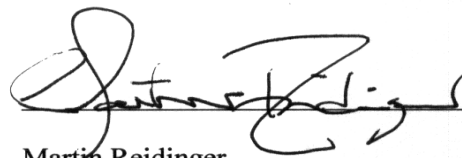
At this point, the second motion to dismiss and the motion for summary judgment are ready for consideration by the Court. The Court will instruct the Clerk of Court to terminate the first motion as a pending

motion since it served as a place holder and was rendered moot by the filing of the second motion. The second motion to dismiss is thereby timely pursuant to the Local Rules.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss contained within the Answer of State Farm [Doc. 4] is deemed to have preserved the Defendant's motion pursuant to Federal Rule of Civil Procedure 12(b)(6).

IT IS FURTHER ORDERED that the second Motion to Dismiss of State Farm [Doc. 15] is timely and the Clerk of Court shall terminate the placeholder motion contained within Document 4 as a pending motion. The Plaintiff's response contained within Document 8 is deemed applicable to Document 15.

Signed: September 1, 2009


Martin Reidinger
United States District Judge

